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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1079

GREAT LAKES TRANSIT CORPORATION,
Petitioner and Appellant Below,

vs.

ALFRED G. MARCEAU,
Respondent and Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ULYSSES S. THOMAS,
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Of Counsel.

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1. By applying for and receiving an award of state compensation prior to bringing the instant action at law, did the respondent thereby elect his remedy, barring recovery in the case at bar? 6

2. Is the decision of this Court in O'Donnell vs. Great Lakes, etc., 318 U. S. 36, (Feb. 1, 1943) extending provisions of the Jones Act, Title 46, U. S. C. A. Sec. 688, to cover shore injuries to seamen injured in the course of their employment, to be given a retroactive effect to cover a cause of action accruing on November 8, 1940, and not pending on the date of the O'Donnell decision? 7

3. Is a seaman injured on the dock at which his ship is moored, while returning thereto from shore leave to perform a regularly assigned duty, "in the course of his employment" in the meaning of the term as used in Title 46 U. S. C. A. Sec. 688, (the Jones Act) and as distinguished from the term "in the service of the ship"? 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Statement of the Case.

This is an action at law brought, on September 23, 1943, in the District Court for the Western District of New York under Title 46, U. S. C. A. Sec. 688 (Jones Act) by respondent herein, for damages for injuries alleged to have been sustained on November 8, 1940, by falling on the dock alongside which the steamer "Alfred H. Smith" to which he was

attached as a member of crew, was being unloaded and loaded by the Conners Contracting Company, independent stevedores under contract with petitioner (R. p. 218). At the time of the accident, allegedly caused by the negligence of the petitioner in permitting or causing a spot of flour or meal (part of the ship's cargo) (R. p. 215) to exist on the dock near the foot of the ship's ladder, (R. pp. 2 and 3), respondent was returning to the vessel from shore leave to perform his duty as second cook, by preparing the crew's midnight lunch (R. p. 52). He had a shore leave earlier in the day (R. p. 77) but had returned to prepare the 6:00 o'clock supper and again departed the ship on shore leave at the end of that meal (R. p. 77).

At about 11:40 P. M. loading and unloading being in progress, respondent approached the vessel returning from his second shore leave, unconnected with business of the ship (R. p. 91) and as he neared the foot of the ladder, slipped and fell in a spot of meal or flour that he saw prior to stepping into it (R. p. 54). He allegedly sustained injury that one of his attending physicians testified was entirely mental (R. p. 190).

In April 1941, respondent applied for and received an award of compensation under the New York Compensation law (R. p. 80), the award being affirmed by the Industrial Board in March, 1943. Also, in the spring of 1941 respondent filed an action at law in the Supreme Court of New York against the Conners Contracting Company, stevedore, (R. p. 82), alleging its negligence in loading and unloading the ship.

The instant action was filed in September, 1943, the petitioner impleading the Conners Contracting Company, steve-

dore, which, during the trial, on motion of its counsel, was dismissed from the case (R. p. 291). The trial was by jury and verdict and judgment were rendered in favor of respondent against petitioner for $4500.00. An appeal was taken by petitioner to the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment at the trial court.

The principal defenses offered by the petitioner at trial were:

1. By applying for and receiving an award of state compensation the petitioner elected his remedy barring this action at law.
2. That on November 8, 1940, the provisions of the Jones Act did not extend to seamen's shore injuries, and that therefore the District Court was without jurisdiction.
3. That respondent being on shore leave, unconcerned with the business of the ship, was not injured in the course of his employment although still in the service of the ship. The Court was therefore without jurisdiction of the cause.

II.

Reasons Relied on for Allowance of the Writ.

1. The decision of the said Circuit Court of Appeals as to the respondent's having elected his remedy by applying for and receiving an award of state compensation by holding that there is no basis for the petitioner's invoking the doctrine of election of remedies, is a decision of a question probably in conflict with applicable decisions of this Court.
2. The decision of the Circuit Court of Appeals as to the retroactive effect of the decision of this Court in

O'Donnell vs. Great Lakes Dredge & Dock Company, 318 U. S. 36, by holding that said decision is no more than a declaration of what was the law from the date the Jones Act took effect, involves an important question of federal law which has not been, but should be, settled by this Court.

3. The decision of the Circuit Court of Appeals as to whether or not the respondent was injured in the course of his employment, by holding that he was under orders to return to his ship from shore leave and holding that in returning to his vessel from that leave he was in the course of his employment, involved an interpretation of a statute (Title 46 U. S. C. A. Sec. 688, the Jones Act) of great importance to the shipping industry and calls for an authoritative and elucidating decision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Second Circuit had in the case, numbered and entitled on its docket No. 151, Great Lakes Transit Corporation, appellant, vs. Alfred G. Marceau, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Second Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated: February 20, 1945.

ULYSSES S. THOMAS,
Counsel for Petitioner.